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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1935.

No. 766

SAMUEL ZIMMERN ET AL.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

LAWRENCE KOENIGSBERGER,
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JESSE F. HOGAN,
NORMAN H. RATTNER,
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INDEX.

Subject Index.

	Page
Summary of argument:	
Point D. The filing by Samuel Zimmern of his petition for rehearing extended the time for appeal of all of the petitioners	1
Conclusion	6

Table of Cases.

Allen v. House, 290 Fed. 253	4
Cleveland Worsted Mills Co. v. Consolidated Textile Corporation, 292 Fed. 129	4
Gaylord v. Kelshaw, 68 U. S. 81	4
Hardee v. Wilson, 146 U. S. 179, 181	4
In re Mussina, 61 U. S. 280	4
Kingman Company v. Western Manufacturing Co., 170 U. S. 675, 678.	3
Masterson v. Howard, 77 U. S. 416	4
Ozan Lumber Company v. Davis Sewing Machine Co., 283 Fed. 436	4
Swan Land and Cattle Company v. Frank, 148 U. S. 603, 610	4
Texas Pac. R. Co. v. Murphy, 111 U. S. 488	3
Voorhees v. Noye Mfg. Co., 151 U. S. 137	5

Statutes Cited.

U. S. C. (1925), Title 26, Sec. 115	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 766

LEILA ZIMMERN, SAMUEL JOSEPH ZIMMERN, JR., JANICE ZIMMERN AND SAMUEL ZIMMERN,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

We respectfully request the Court to consider the brief filed in support of the application for certiorari herein, as supplemented by this brief, as the briefs for the petitioners.

On page 16 of the former there is an error in the citation to *McGourkey* v. *Toledo and O. C. R. Co.*, which is to be found in 146 U. S. 536, and not in 116 U. S., as therein cited.

D.

The Filing by Samuel Zimmern of His Petition for Rehearing Extended the Time for Appeal of All of the Petitioners.

The amended petition for rehearing on the part of Samuel Zimmern, filed August 11, 1934, will be found on pp.

58-60 of the Record. The exact date upon which his original petition for rehearing was filed does not appear in the Record. This was thought to be unnecessary in making up the Record on appeal to the Circuit Court of Appeals, as no objection had been interposed in the District Court either to the filing or consideration of the amended petition for rehearing or to the petitions for appeal of any of the appellants (R. 61, 65, 67), or to the allowance of the appeal (R. 72).

However, it is plainly to be inferred from the Record that the original petition of Samuel Zimmern for rehearing was seasonably filed. On May 11, 1934, less than three months after the date of the original decree, which had been entered on March 3, 1934, and within the November term at which such decree was entered, the District Court extended the term for ninety days "in which time *all matters and orders in connection with this cause* and the amendments of the decree may be entered" (R. 57).

The amended petition for rehearing was filed on August 11, 1934 (R. 58), and was acted on by the District Court at the same time as the petition of Leila Zimmern, as appears from the order of the District Court of August 13, 1934, which recites that the matter came on to be further heard on motion of respondents for a rehearing, and, after amending the decree in accordance with the petition of Leila Zimmern, ordered that as to all other matters and on all further grounds "the said motion for rehearing is denied" (R. 61). The latter part of this order obviously referred to the petition of Samuel Zimmern, as the petition of Leila Zimmern was granted in respect of all of the matters embraced thereby (R. 84-87). Therefore, in passing its decree denying a rehearing on August 13, 1934, the Court must have been also passing on the merits of Samuel Zimmern's amended petition for rehearing.

The various circumstances above set forth bring the case within the rule that where a motion for a new trial was entertained by the Court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made.

Kingman Company v. *Western Manufacturing Co.*, 170 U. S. 675, 678.

Texas Pac. R. Co. v. *Murphy*, 111 U. S. 488.

Furthermore, even if no petition had been filed by Samuel Zimmern prior to August 11, 1934, upon which date the amended petition was filed, the filing of the petition on that date in itself would have been sufficient to extend the time for appeal, in view of the order of May 11, 1934, extending the term of Court for ninety days for all purposes (R. 57).

Assuming, then, that a petition for rehearing was seasonably filed by Samuel Zimmern, there remains to be considered the question of whether the filing of such petition operated to extend the time for appeal of the other appellants, and we respectfully submit that it did. As will appear by reference to his amended petition for rehearing, he sought thereby to reopen the entire case (R. 58-60).

As stated in the brief to which this is supplemental, this was a suit in equity by the United States, as a creditor of Samuel Zimmern, in respect of Federal income taxes, seeking to set aside certain conveyances of real estate by him to the other respondents, who were joined with him as defendants in the District Court. Samuel Zimmern was a necessary party to the suit. The United States was not a judgment creditor, nor had it taken the steps necessary to acquire a lien, i. e., causing the amount of the tax to be placed on the assessment list in the hands of the Collector of Internal Revenue (R. 2-10), as required by 26 U. S. C. (1925), Sec. 115, as follows:

"*115. Lien for Taxes.*—If any person liable to pay any tax neglects or refuses to pay the same after de-

mand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person. * * *"

Samuel Zimmern, as the alleged debtor and alleged fraudulent grantor, was a necessary party to the suit.

Swan Land and Cattle Company v. *Frank,* 148 U. S. 603, 610.

Ozan Lumber Company v. *Davis Sewing Machine Co.,* 283 Fed. 436.

Allen v. *House,* 290 Fed. 253.

Cleveland Worsted Mills Co. v. *Consolidated Textile Corporation,* 292 Fed. 129.

This is so even in those cases where the creditor has a judgment, as it is the debtor's obligation which it is sought by the suit to collect, his insolvency which is to be established, and his fraudulent conduct that requires investigation.

Gaylord v. *Kelshaw,* 68 U. S. 81.

Being thus a necessary party to the litigation, he was a necessary party to the appeal, which could not have been prosecuted without joining him as an appellant, except after summons and severance or equivalent proceeding. One of the reasons for this is so that the appellate tribunal shall not be required to decide twice or three times the same question on the same record.

Hardee v. *Wilson,* 146 U. S. 179, 181.

Masterson v. *Howard,* 77 U. S. 416.

In re Mussina, 61 U. S. 280.

Samuel Zimmern could not take an appeal while his petition for rehearing was pending; if he had done so, his action would have been a nullity.

Voorhees v. *Noye Mfg. Co.*, 151 U. S. 135, 137.

Thus none of the defendants could have taken an appeal until Samuel Zimmern's petition for rehearing had been disposed of, because Samuel Zimmern could not have taken it under the principle of *Voorhees* v. *Noye Mfg. Co.*, 151 U. S. 135, *supra;* and if the other defendants had simply taken an appeal without joining Samuel Zimmern therein, their appeal would have been dismissed for want of proper parties thereto. If they had proceeded against Samuel Zimmern, by summons and severance, or otherwise, his answer would have been that he could not join in the appeal while his petition for rehearing was pending, nor refuse to join in the appeal because to do so might be a waiver of his rights to appeal at all, upon the ground that the Appellate Court will not consider two appeals on the same record.

Masterson v. *Howard*, 77 U. S. 416, *supra.*

Hardee v. *Wilson*, 146 U. S. 179, *supra.*

Thus, if the appeal had been taken by the other respondents while Samuel Zimmern's petition for rehearing was pending, Samuel Zimmern would have lost his right to appeal in the event of a denial of his petition; and, if the decision of the Circuit Court of Appeals herein is correct, the other respondents, by waiting until Samuel Zimmern's petition for a rehearing had been acted on, lost their right of appeal.

It would follow that in a situation such as that here presented, the parties are caught in a procedural snare from which they cannot escape, with consequent deprivation of their right of review by the Circuit Court of Appeals. We respectfully submit that such a conclusion and unfortunate result should not be reached unless the Court is irresistibly

forced thereto; that such result can only be arrived at by an application of procedural rules never heretofore enunciated, and that a logical method of reasoning will lead to the conclusion that the time of all the parties for the taking of their appeal commenced to run when the petition of Samuel Zimmern for a rehearing was denied.

Conclusion.

In conclusion it is submitted:

1. That the time within which Leila Zimmern was required to take her appeal was suspended both by her own application for an amendment of the decree and by the pendency of the application of Samuel Zimmern for a rehearing.

2. That the time of Samuel Zimmern for the taking of his appeal was suspended both by the pendency of his application for a rehearing and the pending application of Leila Zimmern for amendment of the decree.

3. That the time of Samuel Joseph Zimmern, Jr., and Janice Zimmern for the taking of their appeal was suspended by the pending application of Leila Zimmern for an amendment of the decree and the pendency of the application of Samuel Zimmern for rehearing.

4. That the action of the Circuit Court of Appeals for the Fifth Circuit in dismissing the appeal for want of jurisdiction should be reversed.

Respectfully submitted,

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(7595-C)